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Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,

Appellants,

—v.—

STEVEN GARFINKEL, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members that is dedicated to the protection of civil liberties and civil rights. The ACLU has a long history of promoting the First Amendment rights of all persons, including government employees, and protecting these rights from abridgement in the name of "national security". The ACLU also has a long history of protecting civil liberties through promoting openness in government.

Thus, the ACLU has frequently defended Congress' right to obtain information from the executive branch, especially information concerning national defense and for-

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1/ Letters of consent to the filing of this brief have been lodged separately with the Clerk pursuant to Supreme Court Rule 36.2.

eign affairs, so that Congress may exercise its constitutional responsibilities on the most complete record possible. In addition, the ACLU has often expressed its concerns about federal employee nondisclosure agreements applicable to national security information.

Of particular relevance here, the ACLU participated in congressional hearings prior to the passage of the specific legislation that was before the district court in this case, and was directly involved in the process which led to the statute's enactment. See Classified Information Nondisclosure Agreements: Hearings Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. 143-144 (1987). It was understood at the time that the statute was a temporary stopgap measure

that addressed only one of many concerns of both Congress and the ACLU about the use of nondisclosure agreements: namely, the applicability of the agreements to so-called "classifiable" -- i.e., unclassified -- information.

For the reasons set forth below, the district court's decision holding the statute facially unconstitutional as a violation of separation of powers was clearly incorrect. However, developments subsequent to the district court's decision have resolved the controversy over "classifiable" information. Given the current state of the record, this Court should not review the merits of the district court's decision; that decision should simply be vacated as moot.

STATEMENT OF THE CASE

This is a direct appeal of a district court's decision striking down Section 630 of the Continuing Resolution for Fiscal Year 1988[2/] as facially unconstitutional. Section 630 prohibits the President from using federal employee nondisclosure agreements that purport to cover unclassified but "classifiable" national security information. The statute also preserves existing congressional rights of access to executive branch information.

The district court, without elaboration and with no reference to specific provisions of section 630 or to the prior

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2/ Pub. L. No. 100-202, §630, 101 Stat. 1329 (1987). In September 1988, section 630 was reenacted for Fiscal Year 1989 as section 619 of the Treasury, Postal Service and General Government Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721 (1988). This brief refers to both statutes collectively as section 630.

holdings of this Court, held that this congressional limitation on presidential control of national security information is unconstitutional because it interferes with what the district court regarded as the President's plenary authority over national defense and foreign affairs.

The district court's sweeping decision is fundamentally inconsistent with the constitutional scheme established by the framers, endorsed by this Court, and accepted by the political branches that routinely exercise joint authority over national defense and foreign affairs. Section 630 properly implements Congress' power to protect the First Amendment rights of executive branch employees and its own right to receive executive branch information. If this Court reaches the merits, it must reverse the district court's decision.

It is unnecessary, however, for this Court to reach those larger issues, and it should not do so. The controversy addressed by the district court's decision no longer exists. As detailed below, the claims pressed by plaintiffs in the district court related to use of the term "classifiable" in the challenged nondisclosure agreements. Those claims have become moot because of developments subsequent to the district court's opinion. No other issues relating to section 630 are ripe for decision because they are not presented by the factual record in this case.

A. Section 630

Section 630 was adopted by Congress on December 21, 1987. It was prompted by Congress' concern about the term "classifiable" that appeared in two nondisclosure

agreements adopted by the executive branch. Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987). Standard Form ("SF") 189 applied to federal employees with access to classified information, and Form 4193 applied to employees with access to a specific category of classified information called "Sensitive Compartmented Information" ("SCI").[3] Both agreements prohibited the unauthorized disclosure of "classifiable" information as well as information that had, in fact, been classified.[4]

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[3] SCI is a category of classified information involving intelligence sources and methods that consists of "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." DCI Security Committee, Sensitive Compartmented Information: Characteristics and Security Requirements 1 (June 1984), Exh. A to the Declaration of DCI Webster, attached as Exh. 4 to Defts' Mem. of Points and Auth. in Opp. to Mot. for Prelim. Injunction.

[4] SF 189 provided: "As used in this Agreement, classified information is information that is either classified or classifiable under the

(continued...)

This extension of nondisclosure agreements beyond the objective confines of classified information marked a dramatic change from past administrative practice and generated great concern in Congress and among federal employees faced with signing the agreements.

In order to prevent the First Amendment problems caused by a prohibition on disclosures of unclassified but "classifiable" information, Congress provided in section 630 that no funds could be spent "to implement or enforce" any nondisclosure agreement that "contains the term classi-

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4/ (...continued)
standards of Executive Order 12356 . . . ." Joint Appendix ("JA") at 15.

Form 4193 referred to Sensitive Compartmented Information (SCI) and stated that "SCI involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12065 . . . ." JA at 19.

fiable," §630(2), or that applies to unclassified information other than information which is "in the process of a classification determination," §630(1). Congress also imposed a knowledge requirement on any nondisclosure agreement by limiting its reach to information that either is marked classified or is "known" by the employee to be classified or in the process of classification, §630(1). See Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987). In addition, Congress preserved the status quo regarding the statutory rights of employees to disclose information to Members of Congress and the rights of Members of Congress to obtain executive branch information. See §630(3)-(5); 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987).

Section 630 of the Continuing Resolution was enacted for a one year period to give Congress time to study the matter and come up with permanent legislation.[5] It was then reenacted for a second year.[6]

B. District Court Proceedings

On February 19, 1988, the American Foreign Service Association ("AFSA") and seven Members of Congress[7] filed this action alleging that SF 189 and Form 4193

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[5] When enacting section 630, Congress expressed its intent "to examine the entire issue of non-disclosure agreements . . . and to make appropriate responses to executive branch policy in this area as needed." Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987).

[6] See n.2, supra.

[7] Senator David Pryor, Senator Charles Grassley, Congressman Jack Brooks, Congresswoman Barbara Boxer, Congressman Gerry Sikorski, Congresswoman Patricia Schroeder, and Senator William Proxmire, who will retire from the Senate in January 1989.

violate section 630.[8] AFSA is a professional and labor association for employees of the State Department. Most of its members have access to classified information and many of them have access to SCI. In their complaint, plaintiffs sought declaratory and injunctive relief to bar defendants from requiring federal employees to sign the challenged nondisclosure agreements, which then contained the term "classifiable" but effectively no longer do so. Plaintiffs claimed that the nondisclosure agreements as they then existed violated section 630.[9]

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[8] The complaint named as as defendants: Director of Central Intelligence William Webster, Secretary of State George Shultz and Director of the Information Security Oversight Office Steven Garfinkel.

[9] Plaintiffs also sought a declaration that all agreements signed since enactment of section 630 were void.

On March 9, 1988, the district court consolidated this case with two previously filed actions challenging the agreements on constitutional grounds. National Federation of Federal Employees v. United States ("NFFE v. U.S."), No. 87-2284 (D.D.C. Aug. 17, 1987); American Federation of Government Employees v. Garfinkel ("AFGE v. Garfinkel"), No. 87-2412 (D.D.C. Sept. 1, 1987). Following consolidation, all of the plaintiffs moved for summary judgment on the ground that defendants were violating section 630 by continuing to require federal employees to sign SF 189 and Form 4193.10/ In addition, plaintiffs in NFFE v. U.S. and AFGE v. Garfinkel also claimed

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10/ Plaintiffs in the present case had previously filed a motion for preliminary injunction, which was then pending.

that the term "classifiable" was unconstitutionally overbroad and vague.

The government responded by moving to dismiss all three actions.[11] Among other things, the government argued that it had complied with section 630, that plaintiffs' claims were not ripe, and that in any event, section 630 violates the principle of separation of powers.

On May 27, 1988, the district court issued a memorandum opinion and order in the consolidated cases. 688 F.Supp. 671 (D.D.C. 1988). It denied plaintiffs' motions for summary judgment based on the claimed conflict between the nondisclosure agreements and section 630. "Assuming" but not deciding that defendants had failed to

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[11] The government's motion to dismiss was ultimately treated as a motion for summary judgment by the district court. 688 F.Supp. 671, 686 (D.D.C. 1988).

comply with section 630, id. at 683, the district court held the statute to be an unconstitutional violation of the principle of separation of powers:

> Wherever may be drawn the line between the political branches in the area of regulating access to national security information, section 630 surely falls within territory where it is not welcome. The statute impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations.

Id. at 685. Accordingly, the district court granted defendants' motion for summary judgment in the AFSA case because plaintiffs' claims rested solely on section 630.[12/] This direct appeal followed.[13/]

12/ The district court also granted defendants' motion for summary judgment on the grounds that the congressional plaintiffs have no standing to sue. 688 F.Supp. at 682. This brief does not address that question which, as plaintiffs note, the Court need not reach. See Brief of Appellants at n.6.

(continued...)

In the companion cases, NFFE v. U.S. and AFGE v. Garfinkel, plaintiffs' statutory claims were similarly dismissed. The district court did not, however, dispose of the additional claim raised by NFFE and AFGE that the nondisclosure agreements violated the First Amendment. Rather, it reserved this constitutional claim for future consideration. 688 F.Supp. at 675, 689.

C. Proceedings after the District Court's May 27, 1988 Decision

After the appeal in this case was filed, the parties in NFFE v. U.S. and AFGE v. Garfinkel continued to litigate the First Amendment question reserved by the

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13/ (...continued)
13/ Plaintiffs appealed directly to this Court pursuant to 28 U.S.C. §1252, which since that time has been repealed. Pub. L. No. 100-352, §1, 102 Stat. 662 (1988).

district court's May 27, 1988 decision. On July 29, 1988, the district court ruled that the reference to "classifiable" information in the nondisclosure agreements, without further definition or elaboration, was unconstitutionally vague and overbroad. 695 F.Supp. 1196 (D.D.C. 1988).[14/]

The government has chosen not to appeal that ruling. Instead, it has complied with the district court's order by deleting all use of the term "classifiable" from its nondisclosure agreements. Thus,

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14/ On a different constitutional issue, the district court agreed with the government's view that federal employees could be held responsible for disclosures of unmarked information if "they have reason to believe that unmarked information is classified or should be classified and is in the process of becoming so." 695 F.Supp. at 1203-04. Plaintiffs have appealed that ruling, as well as the ruling that section 630 violates separation of powers, to the Court of Appeals. AFGE v. Garfinkel, appeal docketed, No. 88-5402 (D.C.Cir. Nov. 17, 1988); NFFE v. United States, appeal docketed, No. 88-5404 (D.C.Cir. Nov. 22, 1988).

the government no longer requires employees to sign either SF 189 or Form 4193 and cannot enforce the term "classifiable" in any previously signed agreements.

D. Present Status of the Nondisclosure Agreements

No government employees, including the members of the plaintiff association in this case, are now required to sign nondisclosure agreements that cover "classifiable" information. Indeed, the nondisclosure agreements challenged by plaintiffs in this case, SF 189 and Form 4193, are no longer in use. In accordance with the district court's July ruling, the forms which have replaced them do not contain the term "classifiable." See 53 Fed. Reg. 38,278 (Sept. 29, 1988), amending 32 C.F.R. §2003.20; Standard Form 312 and Form 4355,

JA at 54-58, 66.[15] In contrast to their predecessors, the current agreements refer only to classified information or information that meets the standards for classification and is in the process of a classification determination. 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(h).

Moreover, employees who signed nondisclosure agreements containing the term "classifiable" have been informed, or are in the process of being informed, that the term has been stricken from the agreement and no longer has operative effect. See 695 F.Supp. at 1206; 53 Fed. Reg. 38,278

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[15] Defendants replaced SF 189 with Standard Form 312 in response to the district court's holding that the undefined use of the term "classifiable" is unconstitutional. See 53 Fed. Reg. 38,278 (Sept. 29, 1988), amending 32 C.F.R. §20003.20. Form 4355 was approved to replace Form 4193 on March 18, 1988. Declaration of Lt. Gen. Heinz, JA at 52.

(Sept. 29, 1988), amending 32 C.F.R. §2003.20; Appellees' Motion to Affirm at 13. Employees who signed the old agreements have, in addition, been given the right to sign a new agreement that does not refer to "classifiable" information. 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(b).

Current regulations also acknowledge that the nondisclosure agreements do not limit the rights of federal employees to communicate with Members of Congress. Specifically, the applicable regulations state that the terms of the nondisclosure agreements "do not supersede the provisions of section 2302, Title 5, United States Code, which pertain to the protected disclosure of information by Government employees, or any other laws of the United

States." 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(g).

Thus, plaintiffs' claims have been resolved in their favor and there is no remaining controversy about the provisions of section 630 relied upon by plaintiffs in seeking relief below.

SUMMARY OF ARGUMENT

The basis on which the district court entered judgment is far-reaching and unprecedented. Its view of the constitutional separation of powers issue is unsupported by the Constitution or other authority and threatens the sensitive and critical alliance that currently exists between the President and Congress on matters of national defense and foreign affairs. If it reaches the merits, this Court should,

consistent with its prior decisions, reverse the district court's judgment.

However, the Court need not reach the merits of the broad constitutional questions posed by the district court's opinion. The only case or controversy before the district court concerned the defendants' use of the term "classifiable" in nondisclosure agreements in violation of section 630. That dispute is now moot because the term "classifiable" has been removed from the nondisclosure agreements in compliance with the district court's constitutional ruling in related cases.

Although the district court's decision is not confined to those provisions of section 630 relating to the term "classifiable," there is no ripe dispute concerning any violation of any other requirement of section 630. Plaintiffs never claimed any

violation of section 630's knowledge requirement; nor is there an adequate factual record for considering either that requirement or section 630's protection of federal employees' communications with Congress. Thus, any consideration of section 630's constitutionality is premature.

Should the merits be reached, it is essential for this Court to issue an unequivocal statement that Congress is, and must remain, a co-equal partner in the formulation of national defense and foreign affairs policy. The contrary view adopted by the court below is inconsistent with the constitutional approach most forcefully articulated by this Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Accordingly, the decision below must either be vacated or reversed.

ARGUMENT

I. THE DISTRICT COURT'S DECISION SHOULD BE VACATED BECAUSE THERE IS NO CASE OR CONTROVERSY BEFORE THIS COURT

In the district court, plaintiffs challenged defendants' continuing use of two nondisclosure forms. Specifically, plaintiffs claimed that SF 189 and Form 4193 violated section 630 by using the term "classifiable" and thus restricting the disclosure of unclassified information. Since this appeal was filed, the government has ceased using the term "classifiable." Thus, the only dispute before the district court has become moot and the district court's decision must be vacated.

A. The Dispute Concerning Use Of The Term "Classifiable" Is Now Moot

Plaintiffs' claim that the government was violating paragraphs (1) and (2) of section 630, by requiring federal employees to sign nondisclosure agreements covering "classifiable" information that has never been classified, has now become moot.[16/] As a result of a subsequent court order, defendants no longer use either the challenged nondisclosure forms, SF 189 and Form 4193, or any other form containing the term "classifiable."

After its May ruling that section 630 was unconstitutional on its face, the district court held in July that the term "classifiable" was unconstitutionally vague

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16/ This issue of what information is covered by the nondisclosure agreement is analytically distinct from the second issue addressed by section 630 concerning the employee's knowledge of whether information is classified. See Point IB, infra.

and overbroad in violation of the First Amendment rights of government employees. 695 F.Supp. at 1202-04. Echoing section 630, the court held in NFEE v. U.S. and AFGE v. Garfinkel that nondisclosure forms could apply only to information that is classified, or information that meets the standards for classification and is in the process of a classification determination. Id.

The government did not appeal that constitutional ruling, and has since complied with it. Pursuant to the court's decision, the government has notified, or will notify, all employees who signed SF 189 or Form 4193 that the term "classifiable" is stricken from the agreement and that the forms cover only classified information or information that is in the process of a classification determination.

All such employees may also replace their old agreements with a new form that does not refer to "classifiable" information.[17/] The forms that have replaced SF 189 and Form 4193 (SF 312 and Form 4355) are consistent with section 630 in that they do not contain the term "classifiable" and apply only to classified information or

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17/ The fact that some former employees who signed nondisclosure agreements containing the term "classifiable" may not have received notice from the government of the recent changes to the agreement cannot sustain a live controversy as to the constitutionality of section 630. Former employees like present employees are no longer bound by the term "classifiable" in the agreements regardless of whether they receive notice, and the government has been enjoined from enforcing any nondisclosure agreement against any employee unless that employee receives notice. 695 F.Supp. at 1206. Defendants have thus represented that "all employees who signed SF 189 or Form 4193 will be notified" of the changes concerning "classifiable" information. Mot. to Aff. at 19 (emphasis added). In contrast, Congress did not mandate any notice procedures in section 630 although many employees had already signed the disputed agreements at the time of its enactment.

information that meets the standard for classification and is in the process of a classification determination.

As a result of these changes, there is no remaining dispute concerning the use of the term "classifiable" or the applicability of the nondisclosure agreements to information that is unclassified. Accordingly, the question of the constitutionality of those portions of section 630 relating to "classifiable" but unclassified information is now moot.

Moreover, the government agrees with that conclusion. "Because the word classifiable has been completely eliminated from the forms, there no longer is any live controversy in this case under subsection (2) of Section 630 . . . ." Motion to Affirm at 19; see also id. at 8, 14-15.

When a case becomes moot while on appeal, the judgment below must be vacated.[18/] United States v. Munsingwear, 340 U.S. 36 (1950). This Court should, therefore, remand the case with a direction to dismiss:

> [This] procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Id. at 40.

B. There Is No Ripe Dispute Concerning Any Violation Of Section 630'S Knowledge Requirement

In addition to the ban on the term "classifiable" in section 630(2), section

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18/ While defendants appear to agree with much, if not all of our arguments regarding mootness, they incorrectly ask this Court to affirm rather than vacate the district court's decision. Thus, we are in fundamental conflict with defendants on the appropriate remedy in this case.

630(1) also provides that nondisclosure forms may apply only to: (a) information marked classified or (b) information that is "unmarked but known" by the employee to be either classified (e.g. oral information) or in the process of a classification determination.[19/] Papers filed in this Court suggest that there is disagreement between the parties concerning the interpretation of this knowledge requirement. However, the issue of any violation by defendants of this requirement was neither raised in the district court proceedings nor implicated in the evidence placed before the district court. Thus, the district court had no basis for considering

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19/ Section 630(1) refers to: "information . . . specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination."

these provisions of the statute and this Court, as a prudential matter, should not decide their constitutionality.[20/]

Defendants agree that these issues "are not ripe for resolution in the abstract posture of this case." Mot. to Aff. at 21.[21/] Absent an appropriate factual record, this Court cannot engage in the carefully calibrated review that is particularly necessary when adjudicating disputes between the political branches about separation of powers.

20/ Ripeness must be evaluated for each separate provision of section 630. "[E]ven where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality." Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 71 (1961); see Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979).

21/ See n.18, supra.

1. The potential issue of whether there is a conflict between section 630's knowledge requirement and the nondisclosure agreements was never before the district court

Plaintiffs made no claim in the district court that the challenged nondisclosure forms violated the knowledge requirement of section 630(1). A fortiori, plaintiffs made no claim that they were injured by any violation of section 630's knowledge requirement.[22] Thus, this case does not present a ripe dispute in which employees claim the protection of section 630's knowledge requirement against threatened or actual sanctions for disclosing information.[23] Accordingly,

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[22] Plaintiffs' affidavits relate only to the term "classifiable." They do not address defendants' interpretation of the knowledge requirement. See e.g., Affidavit of Perry Shankle, Exh. 15 to Plaintiffs' Motion for a Preliminary Injunction.

[23] There is no claim in the record below that defendants violated the statute's knowledge

(continued...)

this record presents no occasion to decide whether section 630's knowledge requirement conflicts with separation of powers principles.[24/]

Indeed, the district court's opinion does not mention the knowledge requirement and the court made no findings concerning whether the defendants violated that requirement.[25/] Under these circumstances,

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23/ (...continued)
requirement or that plaintiffs were chilled in the exercise of their First Amendment right to speak about unclassified information by any such violation. Such a claim would, of course, establish a ripe dispute. Meese v. Keene, 107 S.Ct. 1862 (1987).

24/ Plaintiffs agree that the constitutional issue only arises if the defendants have violated section 630. See Appellants' Brief, Point A.

25/ In the related cases, NFFE v. U.S. and AFGE v. Garfinkel, the district court rejected claims that the Constitution protected employees from liability for disclosures of classified information when they did not have actual knowledge that it was classified, 695 F.Supp. at 1203-04, but never addressed any violation of the knowledge requirement of section 630.

this Court "ordinarily will not decide questions not raised or litigated in the lower courts." Springfield v. Kibbe, 480 U.S. ___, 107 S.Ct. 1114, 1115 (1987); see City of Lockhart v. United States, 460 U.S. 125, 134 n.9 (1983). Amicus respectfully suggests that this sound rule of judicial administration should be followed in this case.

2. Any dispute that may exist concerning the knowledge requirement cannot be resolved on this empty record

Although the issue was not litigated below, plaintiffs now contend that there is a ripe dispute concerning the knowledge requirement of section 630 because defendant Garfinkel has interpreted the nondisclosure agreement to mean that employees can be punished for disclosures of information whenever they "reasonably should have known" that the information was classified

or in the process of a classification determination. 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(h); see also 52 Fed. Reg. 48,367 (Dec. 21, 1987). Plaintiffs assert that this announced standard violates section 630's requirement that an employee be sanctioned for disclosing unmarked classified information or information that is in the process of a classification determination only when that employee "knows" the information is classified or in the process of a classification determination.

Amicus agrees that the "reason to know standard" articulated by defendant Garfinkel could have a potential chilling effect. However, the existence or extent of any chill was never addressed by the district court. Instead, the attention of the district court and the parties was

focused on the language of the forms themselves, which are silent on the question of a knowledge requirement.[26] The agreements simply recite that covered employees shall not disclose classified information. JA at 15, 19-20.[27]

The difference between defendant Garfinkel's "reasonably should have known" formulation and section 630's knowledge

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[26] For precisely that reason, defendants argue that any objection to defendant Garfinkel's reason to know standard "should not be considered in the context of this case, which presents a challenge to the content of the forms themselves." Mot. to Aff. at 20.

[27] The successor to Form 4193, Form 4355, states that an employee may not disclose information that is marked SCI or that he or she knows to be SCI. It specifically imposes on the employee a duty to ascertain the status of information that he or she has reason to believe might be SCI. JA at 55. Form 4355 and SF 189 also recite that negligent handling of classified information could injure the United States. JA at 15, 19. As set forth above, plaintiffs below did not challenge these provisions of the forms as a violation of section 630 and they cannot appropriately be addressed on this record.

requirement cannot be resolved in the factual vacuum of this record. That is particularly so since the legislative history of section 630 does not illuminate the statute's knowledge requirement[28/] and there is no evidence in the record concerning the executive's application or interpretation of the requirement in any specific context.

In the absence of any factual record concerning defendants' interpretation of the knowledge requirement or whether such interpretation has injured plaintiffs in violation of section 630's knowledge requirement, there is no occasion to decide whether the knowledge requirement is consistent with separation of powers principles. "Courts do not review issues, espe-

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28/ See Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987).

cially constitutional issues, until they have to." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-55 (1951) (Frankfurter, J. concurring).

To the contrary, where the record is inadequate, "resolution of the constitutional issues presented . . . would not be appropriate." De Backer v. Brainard, 396 U.S. 28, 29 (1969). See also International Brotherhood of Teamsters v. Denver Milk Producers, 334 U.S. 809 (1948)("Because of the inadequacy of the record, we decline to decide the constitutional issue involved").

Not only is there no factual record concerning any violation of the knowledge requirement or any potential chill, but the district court never made the inquiry required by the separation of powers principles it invoked to invalidate section 630. Before the court can determine

whether those principles have been infringed, it must determine how the statute functions in order to decide if it "prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. General Services Administration, 433 U.S. 425, 443 (1977), citing United States v. Nixon, 418 U.S. 683, 711-712 (1974). Here, the government supplied no evidence of any claimed need for a "reason to know" standard rather than an actual knowledge standard. See Nixon v. G.S.A., 433 U.S. at 441. Had such a showing been made, the district court would have been obliged to assess whether the impact of section 630 "is justified by an overriding need to promote objectives within the constitutional authority of Congress." Id. Because the knowledge requirement was never litigated below, the

record in this case is completely barren on both these pivotal questions.

In sum, the issue of the constitutionality of section 630's knowledge requirement is not ripe because there has been no claim or showing of any violation of that requirement or injury therefrom. Under these circumstances, the district court's decision should be vacated as premature. See Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147, 158 (1983)(vacating judgment of court of appeals and remanding to NLRB because NLRB had not decided whether the handbilling at issue was proscribed, thus making the constitutional question premature); Pennzoil Co. v. Texaco, Inc., 481 U.S. ___, 107 S.Ct. 1519 (1987)(reversing court of appeals decision and remanding case to district court with instructions to vacate order and dismiss complaint where

case was premature because district court failed to abstain pending appeal of state court judgment to state appellate court); see also U.S. v. Munsingwear, 340 U.S. 36 (1950).

In the alternative, the Court should vacate and remand the case for further consideration and findings by the district court. Such findings would have to include whether defendants have violated the knowledge requirement of section 630. Only after making such a finding should the district court consider the separation of powers question. At that point, an appropriate issue might be presented for review by the Court of Appeals and, eventually, this Court.

C. There Is No Ripe Dispute Concerning Any Violation Of The Provisions Of Section 630 Relating To Communications To Congress

Paragraph 3 of Section 630 prohibits the implementation or enforcement of non-disclosure agreements that obstruct an employee's right "to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress." Paragraph (4) bars any agreement from interfering "with the right of the Congress to obtain executive branch information." And paragraph (5) protects the existing statutory rights of signatories to the nondisclosure agreements. These provisions were designed to preserve the status quo regarding the existing rights of federal employees to petition Congress against infringement by the nondisclosure agreements and to protect Congress' right to obtain executive branch

information. See 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987).

Consistent with these requirements of section 630, defendants' latest regulation expressly acknowledges that the nondisclosure agreements do not interfere with any statutory rights of employees to communicate with Members of Congress.[29/] Thus, there is no present violation of these provisions of section 630 and the district court should never have reached their constitutionality.

29/ SF 189 and its successor, SF 312, "do not supersede [the whistleblower protections of the Civil Service Reform Act, 5 U.S.C. §2302] . . . or any other laws of the United States." 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(g). For example, 5 U.S.C. §7211 provides: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

There is nothing in the record concerning Form 4193 on this issue.

In that regard, the district court made no finding that defendants had violated the congressional communication provisions of section 630 and the record contains no showing of any such violation. Specifically, the district court never addressed whether defendants had attempted to impose a prior authorization requirement on employees' communications to Congress; nor did the court consider whether such a requirement, if it existed, interfered with either the rights of employees or of the Congress in violation of section 630.30/

The district court never considered, therefore, whether there was any ripe case

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30/ The district court's "assumption" that defendants had not complied with section 630 appears to be based solely on the defendants' use of the term "classifiable" in SF 189 and Form 4193. 688 F.Supp. at 683 n.16. As noted previously, that term is no longer in use in the revised nondisclosure agreements.

or controversy concerning the congressional communication provisions of the statute.[31/] As defendants point out, the constitutionality of any congressional prohibition on a prior authorization requirement need not be reached in this "abstract and speculative context." Mot. To Aff. at 27.

Furthermore, the record evidence is insufficient to support a finding that defendants have violated these provisions of section 630. On their face, neither of the challenged nondisclosure agreements speaks to disclosures to Congress, much less imposes a prior authorization

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31/ Two months later in the related cases, NFEE v. U.S. and AFGE v.Garfinkel, the district court held on a virtually identical record that the issue of whether the nondisclosure agreements violate statutory rights of federal employees to communicate with Congress was "a question the court need not address," because "[n]one of the plaintiffs claims that any obligation created by the agreements has been invoked to bar their communication with Congress." 695 F.Supp. at 1199.

requirement on such disclosures. Form 4193 prohibits disclosures to "unauthorized persons" but nowhere defines such persons. JA at 19. Consequently, the "prior authorization" requirement in Form 4193 only applies to disclosures to "unauthorized persons." Defendants themselves have long recognized, however, that Members of Congress are in fact authorized to receive classified information.32/ Accordingly, the fairest reading of Form 4193 is that it does not apply to disclosures to Congress and therefore does not conflict with section 630.

SF 189 also prohibits disclosures to "unauthorized persons" without defining such persons. It requires the employee to obtain "official verification" that the

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32/ See p.56, infra.

recipient of the information has been properly authorized by the "United States government" to receive information before disclosing it. JA at 15. Thus, SF 189 on its face appears to require an employee who has information to disclose to Congress to obtain "official verification" from Congress that Congress is authorized to receive the information before disclosing it. This interpretation is confirmed by the applicable regulation, which states that the form does not conflict with any existing and statutorily guaranteed rights of employees. 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(g).

In short, there is no factual basis on the present record for finding any violation of paragraphs (3) through (5) of

section 630.[33/] In the absence of such violation there was no reason for the district court, and there is no reason for this Court, to reach out and decide a constitutional issue that is not presented and may never develop.

Through the years the legislative and executive branches have worked out a careful accommodation to ensure that each branch has the information it needs to perform its constitutional function. If and when that accommodation breaks down, this Court's intervention may well be required. This case, however, does not present evidence of that breakdown and this Court should refrain from interfering with

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33/ Plaintiffs do not argue that defendants have violated paragraphs (3)-(5) of section 630, only that notice should be given to all employees that, under the applicable regulation, the forms do not conflict with their statutory rights. Whether such notice would be wise is not an issue in this case.

the delicate balance that the political branches have worked out in this sensitive area.

II. IN THE ALTERNATIVE, THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DECISION ON THE MERITS BECAUSE NATIONAL DEFENSE AND FOREIGN AFFAIRS POWERS ARE NOT EXCLUSIVE TO THE EXECUTIVE BRANCH

The district court struck down section 630 as a violation of separation of powers on the ground that the President alone can make policy regarding national security information. The court correctly recognized that "[n]either political branch is expressly charged by the Constitution with regulating accumulation of or access to national security information," 688 F.Supp. at 685, but erroneously concluded from that premise that Congress lacks any authoritative role in the formulation of policy

regarding national security information.[34/] Because it failed to acknowledge that Congress and the Executive are partners in the formulation of national defense and foreign affairs policy, the decision of the district court must be reversed.

A. Congress And The President Share Constitutional Authority To Make Policy On The Uses Of National Security Information

The district court ignored the framework for determining the allocation of powers between the legislative and executive branches that this Court articulated in Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952), and reaffirmed in subse-

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34/ The district court did acknowledge defendants' admission that a "categorical division of responsibility between the Legislative and Executive is not possible" in this area. 688 F.Supp. at 684. The court, however, did not factor congressional power into its analysis beyond suggesting that Congress could provide "criminal and civil sanctions" to punish disclosures of information.

quent decisions. See e.g., Morrison v. Olson, 108 S.Ct. 2597 (1988); Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Nixon, 418 U.S. 683, 707 (1974). As Justice Jackson observed in his famous concurrence in Youngstown: "Presidential powers are not fixed, but fluctuate, depending on their disjunction or conjunction with those of Congress." 343 U.S. at 635. Here, Congress has twice disapproved specific aspects of the President's nondisclosure agreements. See pp. 6-10, supra. By discrediting that disapproval, the district court assaulted the very premise of Youngstown: that the powers of government are shared between the Executive and Congress and, correspondingly, that the authority of those co-equal branches may be

mutually constraining even in matters of national defense and foreign affairs.35/

Because the district court held that executive power simply trumps legislative power in this area, it neglected to inquire how authoritative executive and legislative voices might be harmonized. Recognition of some congressional role would not, as the district court seems to have assumed, shift unilateral, plenary power over national

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35/ The district court's opinion rests on a mistaken reading of United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). In the district court's view, Curtiss-Wright described a role for the President in foreign affairs so broad that it requires judicial elimination of any authoritative congressional role in matters even indirectly related to presidential functions. As this Court's subsequent cases make clear, see e.g., Youngstown, 343 U.S. at 635 n.2, Curtiss-Wright stands for the more modest proposition that Congress may broadly delegate powers to the President in foreign affairs. The Curtiss-Wright opinion nowhere suggests that Congress is required to so delegate. And it is clearly inconsistent with the very premise of the opinion to conclude that Congress has no power to delegate.

security information from the Executive to Congress. Where the coordinate political branches share power, the appropriate test of the validity of congressional action is whether it "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." Morrison v. Olson, 108 S.Ct. at 2621, quoting Nixon v. General Services Administration, 433 U.S. at 443, citing United States v. Nixon, 418 U.S. at 711-12.

Clearly, that is not the case here. There has been no showing that in protecting the First Amendment rights of federal employees to discuss unclassified information and in preserving its own access to information, Congress prevented the Executive from performing its constitutionally assigned function.

B. The President's Powers In National Defense And Foreign Affairs Do Not Bar Congress From Legislating To Protect Individual Constitutional Rights

The district court's opinion needlessly impugns the ability of Congress to protect constitutional values and protect individual rights through its legislative powers. Section 630 reflects congressional concern that restrictions on the release of "classifiable" information would chill debate over national defense and foreign affairs issues in both the public and the legislative arena. That judgment is well within its constitutional authority.

The district court's contrary view reflects neither political reality nor constitutional doctrine. Indeed, only two months after its decision in this case, the district court rejected the notion of exclusive, executive branch author ty over

national security information by ruling that use of the term "classifiable" in the nondisclosure agreements was unconstitutional. NFFE v. U.S., 695 F.Supp. at 1202-04.

Congress, no less than the executive and judicial branches, is obligated to uphold the Constitution and may exercise the national defense and foreign policy powers that it shares with the Executive to fulfill that obligation. Cf. Katzenbach v. Morgan, 384 U.S. 641 (1966). Only this Court, of course, can issue authoritative interpretations of the Constitution. See Marbury v. Madison, 5 U.S. 137 (1803). But nothing in the doctrine of judicial review precludes Congress from refusing to fund an unconstitutional policy devised by the Executive. In performing that role here, Congress was merely fulfilling its

"assigned constitutional function." Morrison v. Olson, 108 S.Ct. at 2621. Its action in that regard is fully consistent with the doctrine of separation of powers.

C. The President's Powers In National Defense And Foreign Affairs Do Not Bar Congress From Legislating To Protect Its Own Constitutional Lawmaking Function

Congress and the Executive regularly share authority over national defense matters and regularly share national security information. To choose just one example, Congress exercises institutional oversight over intelligence activities that reflects an explicit understanding that both political branches have responsibility for national defense and foreign affairs and that neither can fulfill that constitutional responsibility without adequate information. As stated in the Conference

Report to the Intelligence Oversight Act of 1980[36]:

> Neither the executive branch nor the legislative branch is giving up any powers, authorities or rights it may have; rather, both branches recognize the powers, rights, authorities and duties of the other. Through this legislation there are established procedures by which both branches may carry out their separate and joint responsibilities and duties to protect the nation through the use of intelligence information.

Conf. Rep. No. 1350, 96th Cong., 2d Sess. 15, reprinted in 1980 U.S. Code Cong. & Adm. News 4207, 4212.

The potential impact of the district court's ruling on this sharing of power between the political branches is quite

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[36] 50 U.S.C. §413. The Act specifies procedures whereby Congress will be kept "fully and currently informed" of intelligence activities. 50 U.S.C. §413(a)(1).

far-reaching.[37] Congress has frequently exercised its power to withhold spending for executive policies that clash with its foreign policy vision,[38] and has legislated to require disclosure of information in executive hands on numerous occasions.[39]

Indeed, it is much closer to the truth that the district court's opinion would prevent the Congress from performing its

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[37] The district court minimized the impact of its decision by noting that the Executive might choose to exchange national security information with Congress in a spirit of "cooperation." 688 F.Supp. at 685. But today's cooperation can become tomorrow's intransigence. Recognizing that reality, the framers of the Constitution did not rest on such ephemeral guarantees.

[38] For example, the so-called Boland Amendment placed well-publicized restrictions on the Executive's ability to fund the Nicaraguan contras. See Dept. of Defense Appropriations Act, Pub. L. No. 98-473, §8066, 98 Stat. 1837, 1935 (1985).

[39] See Nixon v. General Services Administration, 433 U.S. at 445 (and statutes cited therein).

constitutionally assigned function. As this Court has long recognized, "the power of inquiry . . . is an essential and appropriate auxiliary to the legislative function." McGrain v. Daugherty, 273 U.S. 135, 174 (1927), cited in Morrison v. Olson, 108 S.Ct. at 2621.[40/] Even executive powers expressly granted in the Constitution, let alone the implied executive authority invoked in this case, cannot be so strong as to defeat the very operation of a constitutionally co-equal branch.

40/ See Koh, "Why The President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair," 97 Yale L.J. 1255, 1284 (1988)("Congress' constitutional right to participate in the setting of foreign policy objectives must carry an attendant right to information and consultation").

CONCLUSION

For the reasons stated herein, the decision below should either be vacated or reversed.

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